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IN THE

Supreme Court of the United States

JEFFREY UTTECHT, SUPERINTENDENT,
WASHINGTON STATE PENITENTIARY,

Petitioner,

—v.—

CAL COBURN BROWN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF WASHINGTON AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 550,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Washington is one of its statewide affiliates. *Amici* respectfully submit this brief to assist the Court in resolving a serious question regarding the constitutional right of capital defendants to a fair and impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution: may states exclude for cause prospective jurors based on their views regarding capital punishment without determining whether the jurors can follow the pertinent sentencing law? Given its longstanding interest in the constitutional right to a fair and impartial jury, the proper resolution of that question is a matter of substantial importance to the ACLU and its members.

STATEMENT OF THE CASE

Cal Coburn Brown was convicted of aggravated first-degree murder and sentenced to death by a Washington State jury on December 15, 1993. Pet. App. 105a.

Richard Deal was summoned as a prospective juror for the trial. Prior to learning about Washington's capital punishment scheme, Mr. Deal stated in his jury questionnaire, *inter alia*, that he was in favor of the death penalty if it was proved beyond a shadow of a doubt that the defendant had killed and would kill again. J.A. 62-63.

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[1] Pursuant to Rule 37.3, letters of consent to the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part and no person other than *amici curiae*, their members or their counsel made a monetary contribution to this brief.

During voir dire, defense counsel asked Mr. Deal for "an idea" of his "general feelings about the death penalty," and Mr. Deal responded: "I do believe in the death penalty in severe situations." J.A. 58. Mr. Deal continued:

> A good example might be the young man from, I believe he was from Renton that killed a couple of boys down in the Vancouver area and was sentenced to the death penalty, and wanted the death penalty. And I think it is appropriate in severe cases.

J.A. 58-59.

Upon further questioning, Mr. Deal reiterated: "It would have to be a severe case. I guess I can't put a real line where that might be . . . ." J.A. 59. Defense counsel then asked: "I'm assuming that there would not be any case other than murder that you would think the death penalty would be appropriate[?]" J.A. 59. Mr. Deal replied: "I think that is correct." J.A. 59. Defense counsel continued:

> . . . [I]n Washington even premeditated murders are not eligible for a potential death penalty unless the State also proves aggravating circumstances. In this case the State is alleging or is going to try and prove a number of aggravating circumstances, four of them. Okay. And the ones that they are going to try and prove are that the murder was committed, a premeditated murder was committed during a rape, a robbery, a kidnapping and that it was done in order to conceal a witness or eliminate a witness.
>
> Does that fall within the class of cases that you think the death penalty is appropriate?

J.A. 60. Mr. Deal replied: "I think that would be." J.A. 60.

Defense counsel then asked him, "how about other sentencing options in a case like that, do you think that something other than the death penalty might be an appropriate sentence?" J.A. 60. Mr. Deal replied: "I think that if a person is temporarily insane or things of that [sic] lead a person to do things that they would not normally do, I think that would enter into it." J.A. 61.

Defense counsel proceeded to ask Mr. Deal whether he had previously been aware that a life sentence in Washington is without parole, and Mr. Deal responded: "I did not [know that fact] until this afternoon." J.A. 61.

Defense counsel asked Mr. Deal if he could consider both a death sentence and a life sentence without parole. J.A. 61-62. Mr. Deal responded, "Yes, I could." *Id.*

Defense counsel then asked Mr. Deal to explain "why you think the death penalty is appropriate, what purpose it serves, that kind of thing?" J.A. 62. Mr. Deal explained the basis for his personal belief in the death penalty: "I think if a person is, would be incorrigible and would reviolate if released, I think that's the type of situation that would be appropriate." J.A. 62. Defense counsel responded to this statement of personal belief by asking Mr. Deal whether he "could consider either alterative" knowing what "you didn't know before . . . [that a defendant convicted of capital murder] is not going to get out of jail no matter which sentence you give" him. J.A. 62. Mr. Deal replied, "I believe so, yes." *Id.*

When defense counsel asked whether Mr. Deal would be "frustrated" if the parties at the penalty phase did not "spend a lot of time talking about whether or not" the defendant is "going to kill again," Mr. Deal responded, "I'm not sure." J.A. 62-63.

Defense counsel then asked Mr. Deal whether he thought the death penalty was used to too frequently or not enough in the United States. J.A. 63. He replied:

> It seemed like there were several years when it wasn't used at all and just recently it has become more prevalent in the news anyway. I don't think it should never happen, and I don't think it should happen 10 times a week either. . . . I think in severe situations, it is appropriate.

J.A. 63. Defense counsel responded to this statement as follows: "It sounds like you're a little more comfortable that it is being used some of the time?" J.A. 63. Mr. Deal said, "Yes." *Id.* Defense counsel asked whether Mr. Deal had been unhappy when the death penalty was used less frequently, and Mr. Deal stated, "I can't say I was happy or unhappy, I just felt that there were times when it would be appropriate." *Id.*

Defense counsel then sought to determine whether Mr. Deal could consider a life sentence in light of the state's aggravating factors. J.A. 64. Mr. Deal explained that he "could consider" a life sentence given the state's aggravating factors, but categorically refused to commit to returning a life sentence, explaining, "I don't know if I really have enough information to make a determination." J.A. 64.

Defense counsel asked Mr. Deal whether he could consider mental status evidence as mitigation even if the evidence did not show that the defendant was insane. J.A. 67. Mr. Deal responded, "Yes, I could." J.A. 67. Defense counsel asked Mr. Deal whether he could consider "somebody's childhood or their emotional development" as mitigating circumstances, and Mr. Deal replied: "I could consider it. I don't have strong feelings one way or the other." J.A. 67.

Mr. Deal then stated that he was willing to "accept the responsibility" of making the "important decision" whether the defendant should be sentenced to death or life imprisonment. J.A. 68.

Responding to the prosecutor's questioning, Mr. Deal confirmed that he had stated on his questionnaire that he favored the death penalty if it was proven beyond a shadow of a doubt that the defendant had killed and would kill again. J.A. 69. The prosecutor asked whether he had made this statement before reading his juror's handbook, and Mr. Deal responded affirmatively. *Id.* The prosecutor explained to Mr. Deal that he was "bother[ed]" by the phrase "beyond a shadow of a doubt," and that the state's burden was "beyond a reasonable doubt." *Id.* Mr. Deal initially expressed confusion when confronted with this distinction, responding, "I would have to know the, I'm at a loss for the words here." J.A. 70. He then stated, "I guess it would have to be in my mind very obvious that the person would reoffend." J.A. 70. The prosecutor responded that "we're not talking about that, sir," and then Mr. Deal corrected himself by stating, "Or was guilty, yes." J.A. 70. The prosecutor sought to ensure that Mr. Deal was referring to the defendant's guilt by stating, "So, we're talking about that?" *Id.* Mr. Deal said, "Yes." *Id.* When the prosecutor asked Mr. Deal whether he "would be satisfied with a reasonable doubt standard" and "would be willing to follow the law," Mr. Deal declared, "Yes." *Id.* When the prosecutor explained that "there is [sic] very few things in life absolutely certain," Mr. Deal replied, "I understand." *Id.*

The prosecutor turned to Mr. Deal's belief in capital punishment to ensure that murderers do not murder again. He asked Mr. Deal, "if you could be convinced that he wouldn't kill again, would you find it difficult to vote for the death penalty given a situation where he couldn't kill again?" J.A. 71. Mr. Deal reiterated: "I made that statement more

under assumption [sic] that a person could be paroled. And it wasn't until today that I became aware that we had a life without parole in the state of Washington." J.A. 71. The prosecutor asked, "can you think of a time when you would be willing to impose a death penalty since the person would be locked up for the rest of his life?" J.A. 71-72. Confronted just an hour before with correct information about Washington's capital sentencing scheme, Mr. Deal understandably responded, "I would have to give that some thought. I really, like I said, up until an hour ago did not realize that there was an option of life without parole." J.A. 72. The prosecutor immediately acknowledged: "I realize this is put on you rather suddenly . . . ." *Id.* The prosecutor posed the following question:

> . . . I'm asking you a very important thing and to everyone in here, whether you, knowing that the person would never get out for the rest of his life, two things. And they're slightly different. One whether you could consider the death penalty and the second thing I would ask you is whether you could impose the death penalty. I'm not asking a promise or anything.
>
> But I'm asking you, first, could you consider it, and if you could consider it, do you think under the conditions where the man would never get out again you could impose it?

Id. Mr. Deal answered: "Yes, sir." *Id.*

The prosecutor then asked Mr. Deal the following confusing and double-negative question: "So this idea of him having to kill again to deserve the death penalty is something that you are not firm on, you don't feel that now?" *Id.* Mr. Deal responded: "I do feel that way if parole is an option, without parole as an option. I believe in the death penalty.

Like I said, I'm not sure that there should be a waiting line of people happening every day or every week even, but I think in severe situations it's an appropriate measure." J.A. 72-73.

The prosecutor then once again sought and obtained a pledge by Mr. Deal that he could consider and vote for the death penalty even if the defendant would never be paroled. The prosecutor asked, "But in the situation where a person is locked up for the rest of his life and there is no chance of him ever getting out again, which would be the situation in this case, do you think you could also consider and vote for the death penalty under those circumstances?" J.A. 73. Mr. Deal responded, "I could consider it, yes." *Id.* The prosecutor responded, "Then could you impose it?" Mr. Deal stated: "I could if I was convinced that was the appropriate measure." *Id.*

The court proceeded to question Mr. Deal. The court did not inquire as to Mr. Deal's willingness to consider and impose a death sentence even if the defendant would never be released. Rather, the court asked Mr. Deal whether he now understood the difference between shadow of a doubt and beyond a reasonable doubt, and Mr. Deal explained, "The terminology beyond a shadow of a doubt, when I wrote that I wasn't even sure whether, I mean, it's just terminology that I have heard probably watching Perry Mason or something over the years." J.A. 73-74. Mr. Deal added: "I guess the point I was making that it has to be – –." The court finished his sentence: "You would have to be positive?" Mr. Deal answered: "I would have to be positive, that's correct." J.A. 74. The court inquired, "The State has to convince you?" Mr. Deal responded, "Yes." *Id.* The court asked, "As they would have to convince any reasonable person?" Mr. Deal responded, "Yes." *Id.*

In moving to exclude Mr. Deal for cause, the prosecutor stated that he was not challenging him based upon his confusion about the television phrase, "shadow of a

doubt," because "I think he would certainly stick with the reasonable doubt standard. J.A. 75. The prosecutor moved to challenge Mr. Deal for cause because

> he is very confused about the statements where he said that if a person can't kill again, in other words, he's locked up for the rest of his life, he said, basically, he could vote for the death penalty if it was proved beyond a shadow of [sic]. And I am certainly going to concede that he means beyond a reasonable doubt. And if a person kills and will kill again. And I think he has some real problems with that. He said he hadn't really thought about it. And I don't think at this period of time he's had an opportunity to think about it, and I don't think he said anything that overcame this idea of he must kill again before he imposed the death penalty or be in a position to kill again. So, that is my only challenge.

J.A. 75. Defense counsel did not object and the trial court granted the prosecutor's cause challenge without providing its reasons. J.A. 75.

On appeal, respondent challenged the exclusion of Mr. Deal under *Wainwright v. Witt*, 469 U.S. 412 (1985), and the Washington Supreme Court denied the claim as follows:

> Mr. Deal was properly excused. On voir dire he indicated he would impose the death penalty where the defendant "would reviolate if released," which is not a correct statement of the law. He also misunderstood the State's burden of proof in a criminal case and understood it to be "beyond a shadow of a doubt," although he was corrected later. The

> trial court did not abuse its discretion in excusing Mr. Deal for cause.

State v. Brown, 940 P.2d 546, 604 (Wash. 1997).

Subsequently, respondent petitioned for a writ of habeas corpus in federal court, claiming, *inter alia,* that Richard Deal had been unconstitutionally excluded from the jury due to his views regarding the death penalty. The district court denied the petition, ruling that there was "sufficient evidence to establish that each juror's views would 'prevent or substantially impair' his or her ability to carry out the duties imposed on jurors." Pet. 79a.

On appeal, the United States Court of Appeals for the Ninth Circuit reversed. *Brown v. Lambert*, 451 F.3d 946, 955 (9th Cir. 2006).[2] The Court of Appeals stated that the Washington Supreme Court had not found that Mr. Deal was "unable to follow instructions" and that the state court could not have done so because Mr. Deal "ultimately stated that [he] could consider the death penalty in an appropriate case." *Brown*, 451 F.3d at 950-51 (citing *Gray v. Mississippi*, 481 U.S. 648, 653 (1987). The Court of Appeals determined that, had "there been a finding that [Mr. Deal] was 'substantially impaired' in his ability to follow the law, it would have been unreasonable." *Brown*, 451 F.3d at 951 (citing 28 U.S.C. §§ 2254(d)(2), (e)(1) (footnote omitted)). Further, the court held that the Washington Supreme Court's stated reasons for upholding Mr. Deal's exclusion were "misplaced and insufficient." *Brown*, 451 F.3d at 953.

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[2] The cited opinion replaced an earlier decision reported at 431 F.3d 661, which also reversed the district court's decision. A majority of the non-recused active judges of the Court of Appeals declined to rehear the case en banc. *Brown*, 451 F.3d at 947.

SUMMARY OF ARGUMENT

The Washington courts determined that Mr. Deal was "properly excused" because "[o]n voir dire he indicated he would impose the death penalty where the defendant 'would reviolate if released,' which is not a correct statement of the law." *State v. Brown*, 940 P.2d 546, 604 (Wash. 1997). The courts' decision "involved an unreasonable application of clearly established Federal law" for purposes of 28 U.S.C. § 2254(d)(1) for two reasons:

1. Even if the record reasonably could be read to indicate that Mr. Deal would have been more inclined to vote death for a parole-eligible capital defendant and less inclined to vote death for a parole-ineligible defendant, the Washington courts unreasonably applied this Court's precedents in finding that he was challengeable for cause. Such inclinations would not have prevented or substantially impaired the performance of Mr. Deal's duties in accordance with his instructions and oath. Capital defendants' future dangerousness or probable lack of future dangerousness is a statutorily-prescribed capital sentencing factor under Washington law. No state law limits capital jurors' consideration of this factor when deciding a defendant's fate. Additionally, such a limitation would not withstand constitutional scrutiny under this Court's precedents.

2. The Washington courts unreasonably applied this Court's precedents by determining whether Mr. Deal was biased based upon his views regarding capital punishment and not upon whether the record as a whole showed that "the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Witt*, 469 U.S. at 424 (internal quotation marks and footnote omitted). A fair, complete and contextual reading of his voir dire demonstrates that Mr. Deal

would have been able to perform his duties in accordance with his instructions and oath, and would have been able to consider and impose a death sentence even when the defendant would never be released from prison.[3]

For these same reasons, respondent showed by clear and convincing evidence (provided by the record itself) that the state courts' factual finding of juror bias was erroneous for purposes of 28 U.S.C. § 2254(e)(1), and that the state's erroneous factual determination, in turn, "resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" within the meaning of 28 U.S.C. § 2254(d)(2).

ARGUMENT

I. THE DECISION BY THE STATE COURTS TO EXCLUDE MR. DEAL FOR CAUSE "INVOLVED AN UNREASONBLE APPLICATION OF CLEARLY ESTABLISHED" SUPREME COURT PRECEDENT.

As recognized by both the Washington state courts and the Court of Appeals for the Ninth Circuit, this Court's decision in *Wainright v. Witt*, 469 U.S. 412 (1985), and its progeny governed the state courts' ruling on the prosecution's challenge for cause of Mr. Deal. As shown below, the Washington courts' decisions were an unreasonable application of United States Supreme Court precedent for two reasons.

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[3] As shown in the Statement of the Facts, *supra*, during voir dire, Mr. Deal repeated four times that he believed in the death penalty in severe cases. J.A. 58, 58-59, 59, 63. He also repeated four times that he could impose the death penalty even if the defendant would never be released from prison. J.A. 61-62, 62, 72, 73.

A. EVEN IF MR. DEAL WOULD HAVE BEEN LESS INCLINED TO RETURN A DEATH VERDICT FOR A PAROLE-INELIGIBLE DEFENDANT, HE WAS QUALIFIED TO SERVE UNDER THIS COURT'S PRECEDENTS.

Neither Mr. Deal's strong personal support for the death penalty to prevent recidivist murders nor his alleged inclination to consider a defendant's lack of future dangerousness when determining whether a death sentence is appropriate justified his excusal under *Wainwright v. Witt*, 469 U.S. 412, 424 (1985), and its progeny.

In *Witt*, 469 U.S. at 424, this Court held that the standard for juror exclusion for cause is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *See also Adams v. Texas*, 448 U.S. 38, 45 (1980) (constitutional test for cause exclusion is whether juror's views "would prevent or substantially impair the performance of his [or her] duties as a juror in accordance with [the] instructions and [the] oath"). Thus, the question under *Witt* is the prospective juror's "ability to follow the [pertinent state's capital punishment] law." *Morgan v. Illinois*, 504 U.S. 719, 734 n.8 (1992). Although it is the prerogative of the states to enact and interpret their own capital sentencing laws, *Witt* clearly establishes that the Sixth and Fourteenth Amendments prohibit states from excusing prospective jurors for cause without determining that they are unable to follow the relevant state law. *Witt*, 469 U.S. at 423-24.

The Washington courts failed to address Mr. Deal's ability to follow Washington's capital punishment law, *see Brown*, 940 P.2d at 604,[4] and, thus, unreasonably applied

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[4] The Washington Supreme Court confined its cursory analysis to whether Mr. Deal could correctly *state* the law, and failed to analyze whether he could *follow* the law.

Adams, Witt and *Morgan*. Had the Washington courts considered the question dictated by these precedents, they would have analyzed Mr. Deal's statements during voir dire in the context of Washington's capital punishment scheme, including the central importance in the scheme of future dangerousness and lack of probable future dangerousness, and would have concluded that Mr. Deal was fully able to follow Washington law.

Certainly, Mr. Deal's expressions of strong personal support for the death penalty to prevent recidivist murders did not render him unable to follow Washington's capital law and, thus, constitutionally unqualified to serve under *Adams*, *Witt* and *Morgan*. *See also* Point I (B), *infra* (demonstrating that Washington courts unreasonably applied this Court's precedents by considering only Mr. Deal's views on the death penalty instead of his ability to follow the law). In addition, as demonstrated below, Mr. Deal was qualified under this Court's precedents even if the record supported the contention that he "indicated on several occasions that he would view the likelihood that a defendant would be released and commit murder again as a central consideration when assessing whether imposition of a capital sentence would be warranted."[5] Amicus Br. for United States at 14-15; *see also id.* at 23.[6]

Like numerous other states[7] and as permitted by this

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[5] By "a central consideration," we understand the government to mean one highly significant consideration, among others.

[6] In fact, as demonstrated in the Statement of the Facts, *supra*, a fair, complete and contextual reading of his voir dire demonstrates that Mr. Deal could consider and impose a death sentence even if the defendant would never be released from prison.

[7] *See* Mitzi Dorland and Daniel Krauss, *The Danger of Dangerousness in Capital Sentencing: Exacerbating the Problem of Arbitrary and Capricious Decision-Making*, 29 Law & Psychol. Rev. 63, 64 (Spring 2005) ("Of the thirty-eight states with death penalty statutes, at least twenty-one now include a defendant's potential for future violence among

Court's precedents,[8] the State of Washington recognizes future dangerousness as a legitimate sentencing consideration in capital cases. One of the state statutory provisions governing capital trials states that "[i]n deciding [whether to impose a sentence of death] the jury, or the court if a jury is waived, may consider any relevant factors, including but not limited to . . . [w]hether there is a likelihood that the defendant will pose a danger to others in the future." Wash. Rev. Code Ann. § 10.95.070 (8) (West 2007).[9] The Washington Supreme Court has construed this statute to mean that "future dangerousness or the probable lack of future dangerousness of the defendant is a relevant factor for a jury's consideration in deciding whether to impose a death sentence. In the penalty phase of a capital trial, the jury knows the defendant is a convicted felon. But the extent to which he continues to be dangerous is *a central issue the jury must decide* in determining his sentence." *State v. Finch*, 975 P.2d 967, 1008 (Wash. 1999) (internal quotation marks and citation omitted) (emphasis added). *See also State v. Gregory*, 147 P.3d 1201, 1257 n.46 (Wash. 2006) ("future dangerousness or the probable lack of future dangerousness of the defendant is a relevant factor for a jury's consideration at the penalty phase") (internal quotation marks and citations omitted).[10] No state law limits capital jurors' consideration

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the aggravating factors to be considered in death sentencing.") (footnotes omitted).

[8] *See, e.g., Jurek v. Texas*, 428 U.S. 262, 274-76 (1976) (rejecting claim that future dangerousness was an invalid consideration in imposing the death penalty); *Barefoot v. Estelle*, 463 U.S. 880, 896-97 (1983) ("likelihood of a defendant committing further crimes is a constitutionally acceptable criterion for imposing the death penalty").

[9] This statutory provision was enacted in 1981. It first appeared in the court's jurisprudence in 1982. *See State v. Bartholomew*, 654 P.2d 1170, 1181 n.1 (Wash. 1982), *vacated on other grounds sub nom., Washington v. Bartholomew*, 463 U.S. 1203 (1983).

[10] *See also Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) (under Eighth Amendment, "evidence that the defendant would not pose a danger if

of this factor when deciding a defendant's fate.

Petitioner contends that the "*only* . . . statutory question" for capital jurors is whether they are "'convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency[.]'" Pet. Br. at 38 (quoting Wash. Rev. Code § 10.95.060(4) (emphasis added)). However, Washington law permits capital jurors to make the determination of whether there are "sufficient mitigating circumstances to merit leniency" by considering future dangerousness and the probable lack of future dangerousness. Wash. Rev. Code § 10.95.070 (8). It is thus entirely appropriate for a capital juror in Washington to consider future dangerousness or the probable lack of future dangerousness in deciding a capital defendant's fate. And no Washington law limits capital jurors' consideration of this factor. Like all capital jurors in the State of Washington, Mr. Deal was entitled to consider the likelihood that the defendant would commit further crimes when determining the appropriate sentence.

Because the Washington courts failed to determine that Mr. Deal could not follow Washington law, the state courts' decisions "involved an unreasonable application of clearly established Federal law" for purposes of 28 U.S.C. § 2254(d)(1). *Cf. Wiggins v. Smith*, 539 U.S. 510, 527 (2003) (finding state court decision rejecting ineffective assistance of counsel claim an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), where state court deferred to trial counsel's "strategic" decisions based on inadequate investigation); *Williams v. Taylor*, 529 U.S. 362, 397-98

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spared (but incarcerated) must be considered potentially mitigating"). *Cf. Simmons v. South Carolina*, 512 U.S. 154, 161-62 (1994) (plurality opinion) (parole ineligibility is relevant to the issue of a capital defendant's future dangerousness); *Kelly v. South Carolina*, 534 U.S. 246, 257 (2002) (same); *Shafer v. South Carolina*, 532 U.S. 36, 49 (2001) (same).

(2000) (finding unreasonable application of *Strickland*, 466 U.S. at 684, where state court failed to consider mitigation evidence in determining *Strickland*'s prejudice prong, and where its analysis turned on the narrow exception set forth in *Lockhart v. Fretwell*, 506 U.S. 364 (1993), rather than *Strickland's* reasonable probability test).

Furthermore, the Washington Supreme Court's holding in this case cannot plausibly be read to effect a radical, one-time reversal of the state's long-standing rule that future dangerousness and a probable lack of future dangerousness are proper considerations for capital jurors in that state and that jurors may give these statutory sentencing factors the weight they deem appropriate. *Cf.* Amicus Br. for United States at 14-15, 23 (arguing that the Washington courts excluded Mr. Deal because he would have wrongfully accorded lack of future dangerousness too much mitigating weight). For one thing, nothing in the court's opinion evinces an intent to effect such a monumental change. Moreover, as explained above, Wash. Rev. Code Ann. § 10.95.070 was enacted in 1981, the court first cited it in 1982 and, as recently as 2006, the court reiterated that "future dangerousness or the probable lack of future dangerousness of the defendant is a relevant factor for a jury's consideration at the penalty phase." *Gregory*, 147 P.3d at 1257 n.46.

In any event, under this Court's precedents, the Eighth Amendment would prohibit Washington from limiting capital jurors' authority to consider and determine the weight of a defendant's mitigating factors, including a probable lack of future dangerousness. The Eighth Amendment "guarantees a defendant facing a possible death sentence . . . the right to consideration of" his mitigating factors "by the sentencing authority." *Franklin v. Lynaugh*, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring) (citing *Lockett v. Ohio*, 438 U.S. 586 (1978)). *Lockett* established that a State may not prevent the capital sentencer "from giving

independent mitigating weight" to a defendant's mitigating factors. 438 U.S. at 605. Under *Lockett* and its progeny, the "sentencer determine[s] the weight to be given relevant mitigating evidence." *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982); *see also id.* at 115 n.10; *Mills v. Maryland*, 486 U.S. 367, 376 n.8 (1988) (under Eighth Amendment, it is in "jury's discretion [to] attach[] significance to the presence of mitigating circumstances").

Thus, if the Washington Supreme Court's decision in this case is somehow construed to effect a radical, one-time reversal of the state's long-standing rule that future dangerousness and a probable lack of future dangerousness are proper considerations for capital jurors in that state and that jurors may give these statutory sentencing factors the weight they deem appropriate, the decision unreasonably applied *Lockett* and its progeny. *Cf. Wiggins*, 539 U.S. at 527; *Williams*, 529 U.S. at 397-98. So construed, the court's decision would "involve[] an unreasonable application of clearly established Federal law" for purposes of 28 U.S.C. § 2254(d)(1).

B. WASHINGTON COURTS UNREASONABLY APPLIED THIS COURT'S PRECEDENTS BY DETERMINING WHETHER MR. DEAL WAS QUALIFIED TO SERVE BASED UPON HIS VIEWS REGARDING THE DEATH PENALTY RATHER THAN HIS ABILITY TO FOLLOW THE LAW.

The Washington Supreme Court's decision also was an unreasonable application of this Court's precedents because the court determined Mr. Deal was biased based upon his views regarding the death penalty and ignored his repeatedly-expressed willingness to follow the law and impose a death sentence in appropriate circumstances, even if the defendant would never be released. *See Brown*, 940 P.2d at 604 (listing beliefs about death penalty stated by Mr. Deal during voir dire and ignoring his repeatedly-stated ability to

follow the law).[11] Under this Court's case law, the appropriate inquiry is not focused on prospective jurors' views about the death penalty, but rather their ability to perform their duties in accordance with the law, judicial instructions, and their oath. *See Witt*, 469 U.S. at 424 ("Th[e] standard is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"). The state courts unreasonably failed to employ that standard in this case.

The distinction between a juror's views regarding the death penalty and his or her ability to follow the law is clearly established by *Adams v. Texas*, 448 U.S. 38 (1980), *Witt*, 469 U.S. at 424, *Darden v. Wainwright*, 477 U.S. 168, 178 (1986), and *Morgan v. Illinois*, 504 U.S. 719 (1992). In *Adams*, this Court reversed petitioner's death sentence because prospective jurors at his trial were improperly excused for cause based upon their views against capital punishment. The Court stated that the constitutional test for cause exclusion is not whether jurors opposed capital punishment but whether their views "would prevent or substantially impair the performance of [their] duties as a juror in accordance with [their] instructions] and [their] oath." 448 U.S. at 45. The Court also stated that an "inability to deny or confirm any effect whatsoever [of the prospective juror's views of capital punishment] is [not] equivalent to an unwillingness or an inability on the part of

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[11] The Washington Supreme Court also noted Mr. Deal's statement in his jury questionnaire referencing proof "'beyond a shadow of a doubt.'" *Brown*, 940 P.2d at 604. Neither the prosecutor at trial nor Petitioner in this Court assert that this misstatement of law -- made before Deal had been instructed that the burden is beyond a reasonable doubt and agreed to apply the correct standard – rendered Mr. Deal excludable for cause. *See, e.g.*, J.A. 75 (prosecutor moving to challenge Mr. Deal for cause "not on the term beyond a shadow of a doubt, I think he would certainly stick with the reasonable doubt standard").

the jurors to follow the court's instructions and obey their oaths," and that Texas had improperly excluded for cause jurors "whose only fault was . . . to acknowledge honestly that they might or might not be affected" by the prospect of imposing a death sentence. *Id.* at 50-51.

In *Witt*, the Court explicitly adopted the *Adams* test, holding that the standard for juror exclusion is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" 469 U.S. at 424. The Court made clear that the appropriate inquiry cannot be limited to a mechanical recitation of a single question and answer. *Id.* at 424-26. In *Darden*, the Court reiterated this test and explained that the determination of whether a trial court improperly granted a prosecution cause challenge under *Witt* must involve an examination of "the context surrounding" the juror's exclusion. 477 U.S. at 176. In *Morgan*, the Court applied this test to defense challenges for cause of prospective jurors based on their views regarding capital punishment. 504 U.S. at 728.

Under *Adams*, *Witt*, *Darden* and *Morgan*, a court must not simply inquire whether jurors' feelings and beliefs regarding capital punishment conform to the law, but also must determine whether those feelings and beliefs would prevent or substantially impair the juror from following the law. Here, the *only* inquiry made by the Washington Supreme Court was whether Mr. Deal's beliefs regarding capital punishment correctly stated the law. *See Brown*, 940 P.2d at 604. Under this Court's precedents, beliefs stated during voir dire by prospective jurors about capital punishment do not determine their qualifications to serve. Intuitively knowing and agreeing personally with capital sentencing law is not a prerequisite for jury service. When s/he sits down in the jury box, a prospective capital juror need not be able to articulate when imposing a death sentence

would be legally authorized. Moreover, the parties and the courts rightfully expect prospective jurors to speak with candor concerning their feelings about the death penalty (and any other pertinent issue) during the jury selection process. As one state court has noted,

> Voir dire examination occurs when a prospective juror quite properly has little or no information about the facts of the case and only the most vague idea as to the applicable law.

Soto v. Commonwealth, 139 S.W.3d 827, 848-49 (Ky. 2004).

Numerous courts recognize that under this Court's precedent the relevant inquiry is not whether prospective jurors' beliefs regarding capital punishment conform to the law, but whether they can put aside those beliefs and fairly apply the law. *See, e.g., Szuchon v. Lehman*, 273 F.3d 299, 329 (3d Cir. 2001) (reversing when a juror was "barred from jury service because of [his] views about capital punishment . . . . [, not because of his] inability to follow the law or abide by [his] oath[]"); *Gall v. Parker*, 231 F.3d 265, 330-31 (6th Cir. 2000) (reversing where prospective juror's "discomfort with the death penalty did not appear to 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath'"); *United States. v. Chanthadara*, 230 F.3d 1237, 1272 (10th Cir. 2000) (vacating sentence where the trial court "failed to clarify prior to excusing [prospective juror] for cause that she opposed the death penalty to a degree which would have made it impossible for [her] to follow the law") (internal citations and quotation marks omitted); *People v. Heard*, 75 P.3d 53, 64 (Cal. 2003) ("In view of [prospective juror's] clarification of his views during voir dire, we conclude that his earlier juror questionnaire response, given without the benefit of the trial court's explanation of the governing legal principles, does not provide an adequate basis to support [his] excusal for

cause."); *Farina v. State*, 680 So. 2d 392, 398 (Fla. 1996) (reversing death sentence where, although prospective juror "may have equivocated about her support for the death penalty, her views on the death penalty did not prevent or substantially impair her from performing her duties as a juror in accordance with her instructions and oath"); *Jarrell v. State*, 413 S.E.2d 710, 712 (Ga. 1992) (reversing where the evidence showed that prospective juror had "qualms" about imposing the death penalty, not that she was unable to follow the law); *Clark v. State*, 929 S.W.2d 5, 10 (Tex. Crim. App. 1996) (reversing where prospective juror with religious scruples against the death penalty was struck for cause without sufficient "inquiry whether" she could follow Texas law "and answer the special issues without conscious distortion or bias"); *Durrough v. State*, 620 S.W.2d 134, 142 (Tex. Crim. App. 1981) (reversing where prospective juror who had conscientious scruples against capital punishment repeatedly stated that she could answer the questions put to her based on the evidence presented at punishment phase of trial).

Indeed, courts virtually always deny defense cause challenges to prospective jurors who personally favor the death penalty in all murder cases, but who, like Mr. Deal, make clear that they can follow the law once the law is explained to them. *See, e.g., Johnson v. State*, 820 So. 2d 842, 853-55 (Ala. Crim. App. 2000) (rejecting defendant's argument that trial court erred by denying his cause challenges to prospective juror who favored an "eye for an eye" and to similar prospective jurors, and noting that "jurors who give responses that would support a challenge for cause may be rehabilitated by subsequent questioning by the prosecutor or the court"); *People v. Ledesma*, 140 P.3d 657, 672-75 (Cal. 2006) (affirming denial of challenges to several prospective jurors who were strongly in favor of the death penalty, including one who said that "anyone who intentionally kills another person automatically should

receive the death penalty and that he would not be willing to give weight to the defendant's background"); *Conde v. State*, 860 So. 2d 930, 939, 941 (Fla. 2003) (affirming denial of cause challenge to prospective juror who initially said she "would automatically be in favor of the death penalty" and to one who initially said "he felt the death penalty should be mandatory in some circumstances"); *Sallie v. State*, 578 S.E.2d 444, 508 (Ga. 2003) (affirming denial of cause challenge to juror who initially said that "if someone committed murder he should get the death penalty and that he believed in an eye for an eye"); *Soto*, 139 S.W.3d at 849 (affirming denial of challenge to prospective juror who initially said she was in favor of an eye for an eye); *State v. Juniors*, 915 So. 2d 291, 310 (La. 2005) (affirming denial of cause challenge to prospective juror who initially said he believed in an eye for an eye and that "if you kill somebody, you don't deserve to live"), *cert. denied*, 126 S.Ct. 1940 (2006); *Threadgill v. State*, 146 S.W.3d 654, 66-69 (Tex. Crim. App. 2004) (affirming denial of challenge to prospective juror who initially said that "no one should be allowed to live for killing someone else").

The Washington Supreme Court's decision was an unreasonable application of *Adams*, *Witt*, *Darden* and *Morgan* because the court determined that Mr. Deal was biased based upon his views regarding the death penalty and ignored his repeatedly-expressed willingness to follow the law and impose a death sentence in appropriate circumstances, even if the defendant would never be released. *See Brown*, 940 P.2d at 604. Like the prospective jurors in the above-cited cases, Mr. Deal explained his personal views regarding the death penalty, but repeatedly made clear that he could consider and impose a death sentence under the law as instructed, including when the defendant would never be released. J.A. 60, 61-62, 62, 72, 73.

By making their determination solely on the basis of Mr. Deal's stated views about capital punishment, the Washington courts utilized a standard contrary to this Court's precedents and, thus, their decisions "involved an unreasonable application of clearly established Federal law" for purposes of 28 U.S.C. § 2254(d)(1). *See Wiggins*, 539 U.S. at 527; *Williams*, 529 U.S. at 397-98 (finding unreasonable application of clearly-established federal law where state courts' analysis turned on wrong standard of review for ineffective assistance of counsel claim).

II. RESPONDENT SHOWED BY CLEAR AND CONVINCING EVIDENCE THAT THE STATE COURTS' FACTUAL FINDING OF JUROR BIAS WAS ERRONEOUS AND, IN TURN, THAT THE STATE COURTS' FINDING WAS AN UNREASONABLE DETERMINATION OF THE FACTS.

Respondent Brown showed by clear and convincing evidence (provided by the record itself) that the state courts' finding of juror bias was erroneous for purposes of 28 U.S.C. § 2254(e)(1). In turn, the state's erroneous determination "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" within the meaning of 28 U.S.C. § 2254(d)(2).

The record in this case contains no evidence that Mr. Deal was biased against the prosecution as this Court has construed the meaning of bias in the capital context. *See* Point I, *supra*. The state courts' finding of juror bias was unreasonable under 28 U.S.C. § 2254(d)(2) and erroneous for purposes of 28 U.S.C. § 2254(e)(1) for the same reasons that the state court unreasonably applied this Court's precedents for purposes of 28 U.S.C. § 2254(d)(1). *See* Point I, *supra*. Most specifically, the state courts' factual finding of juror bias was erroneous because Mr. Deal's views regarding

capital punishment did not prevent or substantially impair him from following Washington's capital punishment scheme.

That the state courts' finding of bias was erroneous under 2254(e)(1) is readily apparent when Mr. Deal's voir dire is compared with the voir dire of the juror who this Court found biased in *Wainwright v. Witt*, *supra*, and the voir dire of the juror who this Court found sufficiently impartial in *Gray v. Mississippi*, 481 U.S. 648 (1987).

Here is the pertinent voir dire of the unqualified prospective juror in *Witt*:

> "[Q. Prosecutor:] Now, let me ask you a question, ma'am. Do you have any religious beliefs or personal beliefs against the death penalty?
>
> "[A. Colby:] I am afraid personally but not-
>
> "[Q]: Speak up, please.
>
> "[A]: I am afraid of being a little personal, but definitely not religious.
>
> "[Q]: Now, would that interfere with you sitting as a juror in this case?
>
> "[A]: I am afraid it would.
>
> "[Q]: You are afraid it would?
>
> "[A]: Yes, Sir.
>
> "[Q]: Would it interfere with judging the guilt or innocence of the Defendant in this case?
>
> "[A]: I think so.
>
> "[Q]: You think it would.
>
> "[A]: I think it would.

"[Q]: Your honor, I would move for cause at this point.

"THE COURT: All right. Step down."

Witt, 469 U.S. at 415-16. The difference between the views of this juror in *Witt* and the views of Mr. Deal could not be starker. The above exchange, short though it was, obviously established a sound predicate for a finding that the prospective juror was substantially impaired in her ability to follow the law. Here, in sharp contrast to *Witt*, the record plainly and unambiguously establishes that Mr. Deal was more than willing to convict and impose a death sentence – so long as the State met its burden of demonstrating to him that it "was the appropriate measure." J.A. 73.

The voir dire in *Gray* also demonstrates that the state court's finding of bias in this case was erroneous under 28 U.S.C. § 2254(e)(1). In *Gray*, this Court agreed with the Mississippi Supreme Court that the trial court had erred by granting the prosecution's challenge for cause of a prospective juror. 481 U.S. at 659. As this Court explained, "Although the voir dire of member Bounds was somewhat confused, she ultimately stated that she could consider the death penalty in an appropriate case . . ." *Id.* at 653. Similarly, Mr. Deal stated that he could consider – and indeed that he could impose – the death penalty in an appropriate case. J.A. 60, 62, 72, 73. Thus, both *Witt* and *Gray* serve to establish that the state courts' finding of juror bias was erroneous for purpose of 28 U.S.C. § 2254(e)(1).

The Washington courts' error is also amply demonstrated by comparisons with the lower court decisions addressing trial court's findings of bias set forth in Point I.B, *supra*. These cases, particularly those upholding trial court decisions denying defense cause challenges under *Morgan*, underscore the unreasonableness of the trial court's factual determination that Mr. Deal was not qualified to serve.

Courts routinely deny defense cause challenges when jurors initially insist on "an eye for an eye" in all murder cases, and then, after the law is explained to them, assert that they can follow the law. Why did the Washington courts fail to employ this same standard in this case? The record provides no answer. Rather, clear and convincing evidence – Mr. Deal's repeated and uncontradicted assurances that he could follow the law – rebuts the state court finding that he was unqualified to serve by clear and convincing evidence and shows that finding to be unreasonable. 28 U.S.C. § § 2254(d)(2), 2254(e)(1). *See Miller-El v. Dretke*, 545 U.S. 231, 265 (2005) (discrediting under these statutory habeas standards prosecutor's denial that he struck jurors because of their race based on "'how reasonable, or how improbable, the [prosecutor's] explanations'" were in light of the contrary facts in the record).

CONCLUSION

For the reasons stated herein, the judgment below should be affirmed.

Respectfully submitted,

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